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No. 07-1180

FILED

APR 17 2008

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SUPREME COURT, U.S.

IN THE

# Supreme Court of the United States

DEFENDERS OF WILDLIFE AND SIERRA CLUB,
*Petitioners*,

v.

MICHAEL CHERTOFF,
Secretary of Homeland Security,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States District Court for the District of Columbia**

## BRIEF OF *AMICI CURIAE* WILLIAM D. ARAIZA AND OTHER CONSTITUTIONAL AND ADMINISTRATIVE LAW PROFESSORS LISTED HEREIN IN SUPPORT OF PETITIONERS


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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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## STATEMENT

William D. Araiza and the other professors of constitutional and administrative law listed herein respectfully submit this *amicus* brief in support of the petition for a writ of certiorari.[1]

## INTEREST OF THE *AMICI*

*Amici* are professors who study, teach and publish on constitutional and administrative law. *Amici* share the view that Section 102 of the Illegal

[1] No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than counsel for *amici curiae* made a monetary contribution to its preparation. The parties have filed letters consenting to the filing of this brief with the Clerk of this Court.

Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note ("IIRIRA"), raises profound, unanswered questions concerning the elimination of any judicial review (except on constitutional questions) of an executive agency's delegated, wholly discretionary power to waive any statutes, whether federal, state or local, that the agency sees fit in order to accomplish a given goal. Section 102(c) of IIRIRA precludes judicial review while granting unprecedented power to the Secretary of Homeland Security to waive any laws on the books, including laws that extend far beyond that agency's area of expertise and regulatory authority. This case, in a starker fashion than any before, raises the question of whether the "intelligible principle" requirement for an exceptionally broad delegation of one branch's powers can be satisfied in the absence of judicial review. Given that the agency at this moment is wielding the waiver power conferred upon it by Section 102 without constraint, this case squarely presents the fundamental question of whether the Constitution allows Congress to grant unlimited, unfettered and unreviewable power to an executive branch official to waive any law he or she deems "necessary" to accomplish a stated goal. For this reason, *amici* believe this case warrants the Court's review.

*Amici* represent a wide range of experiences, backgrounds and philosophical perspectives. Many *amici* are practitioners who have litigated constitutional or administrative cases. All of the *amici* have published and lectured extensively on issues of constitutional and/or administrative law. *Amici* sign this brief in their individual capacities.

A list of the *amici* appears as Appendix A, reproduced at 1a-3a.

## SUMMARY OF ARGUMENT

The assurance of judicial review has been at the heart of this Court's review of constitutional challenges to Congressional delegations of power. In particular, the availability of judicial review underlies this Court's "intelligible principle" jurisprudence. *See, e.g., Touby v. United States*, 500 U.S. 160, 168-69 (1991); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 216 (1989); *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Yakus v. United States*, 321 U.S. 414, 426 (1944). However, this Court has never directly addressed the question of whether, in the case of an exceptionally broad delegation, satisfaction of the "intelligible principle" test requires the availability of judicial review. Put another way, can the "long-standing principle" that Congress may delegate powers to the executive branch "so long as Congress provides an administrative agency with standards guiding its actions *such that a Court could 'ascertain* whether the will of Congress has been obeyed . . .'" be satisfied if the "court" is entirely removed from the principle's operation? *See Skinner*, 490 U.S. at 216 (emphasis added). This Court has never answered this question, which is of critical importance to ensuring that Congress's delegation of authority to executive branch agencies is done in a manner consistent with separation of powers.

Section 102 of the IIRIRA presents this Court with the most sweeping and starkest possible context to address this question, because Congress could scarcely have made a broader delegation than this one. Section 102(c)(1) of the IIRIRA grants the Secretary of Homeland Security, "[n]otwithstanding any other provision of law," the "authority to waive

all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." Pursuant to this authority, the Secretary already has issued five waivers nullifying 30 statutes and all rules, regulations and legal requirements deriving from or related to the subject matter of those statutes along much of the border with Mexico. Among other laws, almost every federal environmental and historic preservation statute has been waived, as have the Religious Freedom Restoration Act and the Administrative Procedure Act.

The Secretary has asserted that these sweeping waivers are "necessary" but, contrary to what normally might occur in the context of reviewable agency action, has offered no reasons why. None of these waivers can be reviewed by the courts except on constitutional grounds. IIRIRA § 102(c)(2)(A).[2] Neither this Court, nor any court of appeals, has ever been asked to review a delegation to suspend statutory requirements that is this far reaching, nor has any court ever upheld as broad a delegation of legislative power to the executive branch in the absence of judicial review.

We submit that the Court should grant the writ of certiorari to address whether such a delegation can be made without judicial review. In addition, this Court may wish to take this opportunity to consider whether there are circumstances under which the Congressional delegation must be subjected to greater scrutiny, such as when a delegation is

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[2] The statute also precludes any right of appeal to the Courts of Appeal following a determination of a constitutional question. IIRIRA § 102(c)(2)(C).

especially broad or when an agency is permitted to waive laws that are outside the scope of its expertise. The unrestricted grant of power to an unelected official to waive any law on the books he deems "necessary" for his purposes, including not only substantive laws but also procedural statutes, raises the specter of arbitrary power and the loss of liberty. "Liberty is always at stake when one or more branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). We respectfully submit that a writ of certiorari should issue in this case.

## ARGUMENT

### I. SECTION 102(c) OF IIRIRA PRESENTS A UNIQUELY BROAD DELEGATION WITHOUT JUDICIAL REVIEW

Whether the non-delegation principle requires judicial review for especially broad grants of policy-making authority is a question presented here in the context of an unprecedently sweeping delegation. We will return shortly to the jurisprudential concerns that, we suggest, compel issuance of a writ of certiorari here. But first it is appropriate to consider the breadth and open-ended nature of Section 102(c)'s delegation and the Secretary's sweeping exercise of that power to date.

Section 102(c) of the IIRIRA directs the Secretary of Homeland Security to take such actions as may be necessary to install physical barriers and roads (including the removal of obstacles to the detection of illegal immigrants) in the vicinity of the United States border. To achieve this end, Section 102(c)(1) provides:

> (c)(1) Notwithstanding any other provision of law, the Secretary of Homeland Security shall

> have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

IIRIRA § 102(c)(1).

This delegation of authority to an executive agency to waive any law or legal requirement, whether federal, state or local, is unprecedented. Certainly a number of federal laws have authorized an agency official to waive legal requirements in particular circumstances. But such delegations have typically involved directions to the executive to waive particular provisions of laws. Moreover, such directions usually instruct or authorize the executive to waive only provisions of the same law containing the waiver authority itself, and such waivers usually are subject to judicial review.

Here the delegation, while limited as to purpose, is unlimited as to application. The Secretary of Homeland Security, upon a mere pronouncement that he finds waiver "necessary," can waive any law promulgated by any authority in effect anywhere in the nation. As far as we can determine Congress has never delegated to a federal agency anything approaching such an omnibus waiver authority. As an independent study by the Congressional Research Service concluded:

> After a review of federal law . . . we were unable to locate a waiver provision identical to that of § 102 of H.R. 418—i.e., a provision that contains 'notwithstanding language,' provides a secretary

> of an executive agency the authority to waive all laws such secretary determines necessary, and directs the secretary to waive such laws. Much more common, it appears, are waiver provisions that (1) exempt an action from other requirements contained in the Act and authorizes the action, (2) specifically delineate the laws to be waived, or (3) waive a grouping of similar laws.

Congressional Research Service Memorandum, *Section 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders*, Feb. 9, 2005, at 7a-8a, reproduced at Appendix B.

Moreover, prior delegations to an executive agency of the power to waive laws usually, if not always, have involved the waiver of laws within the purview of that agency's expertise and specialized knowledge. The broad delegations this Court has reviewed in the past differ from "the delegation at issue here in that agencies often develop subsidiary rules under the statute." *Clinton*, 524 U.S. at 489 (Breyer, J., dissenting). "Doing so diminishes the risk that the agency will use the breadth of a grant of authority as a cloak for unreasonable or unfair implementation." *Id.* (citing 1 K. Davis, *Administrative Law* § 3:15, pp. 207-208 (2d ed. 1978)).

> Such delegations of power permit the legislature to declare the end sought and leave technical matters in the hands of experts, or to leave to others the task of devising specific rules to carry out congressional policy in a variety of factual situations. Where, as is often the case, even major policy decisions may turn on specialized knowledge and expertise beyond legislative ken, delegation of rulemaking power may be made under broad standards to a body chosen

> for familiarity with the subject matter to be regulated.

*McGautha v. California*, 402 U.S. 183, 276 (1971) (Brennan, J., dissenting), *vacated on other grounds sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972).

Section 102(c) of IIRIRA, by contrast, gives the Secretary of Homeland Security the authority to waive rules and regulations in every area of the law, far outside his department's specialized knowledge and expertise, and regardless of what those with specialized knowledge and expertise have concluded is necessary and appropriate when developing the rules and regulations waived. This delegation is uniquely suspect in that it allows the Secretary to selectively and without reason waive not only substantive but procedural statutes, such as the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (the "APA").

The Secretary's exercise of the Section 102(c) waiver delegation has been as unfettered in practice as it is unlimited in authorization. On September 22, 2005, the Secretary invoked his authority under IIRIRA § 102(c) to waive "in their entirety," along a 14 mile stretch of the U.S. border with Mexico near San Diego, "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* ("NEPA"), the entirety of the APA, and six other environmental and historic preservation statutes. 70 Fed. Reg. 55,622 (Sept. 22, 2005). On January 19, 2007, the Secretary invoked his Section 102(c) authority to waive in Arizona's Barry M. Goldwater Range "all federal, state or other laws, regulations and legal requirements of, deriving from or related to the

subject of" NEPA, the APA and eight other statutes. 72 Fed. Reg. 2,535 (January 19, 2007).[3]

On October 26, 2007, two weeks after the issuance of a temporary restraining order by the district court below (following a finding that the petitioners had demonstrated a substantial likelihood of success on the merits that the Secretary had violated NEPA and the Arizona-Idaho Conservation Act of 1988), the Secretary invoked his authority under Section 102(c) of IIRIRA to waive in the San Pedro Riparian National Conservation Area (the "SPRNCA") "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" NEPA, the Arizona-Idaho Conservation Act, and seventeen other laws, including the entirety of the APA.[4] He asserted that the waiver of these laws in the SPRNCA was "necessary . . . to ensure the expeditious construction of the barriers and roads," but provided no explanation of the reasons for that determination. 72 Fed. Reg. 60,870 (Oct. 26, 2007). This is the waiver specifically addressed in the petition for a writ of certiorari.

On April 1, 2008, the Secretary issued a sweeping waiver covering 470 miles of the border from California to Texas. Again invoking his authority under Section 102(c) of the IIRIRA, the Secretary waived "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" 30 laws, again including NEPA, the

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[3] The Barry M. Goldwater Range is described in the Bureau of Land Management's "Legal Description of Barry M. Goldwater Range Withdrawal, AZ." 66 Fed. Reg. 59,813 (Nov. 30, 2001).

[4] The other laws identified by name in the October 26, 2007 waiver are listed in the Petition. See *Defenders of Wildlife*, Pet. App. 7, n.3.

Arizona-Idaho Conservation Act and the entirety of the APA.[5] Secretary Chertoff asserted that the waiver of these laws, in their entirety and across much of this nation's Mexican border, is "necessary . . . to ensure the expeditious construction of the barriers and roads." The Secretary provided no explanation of why he found it "necessary" to waive all provisions of 30 statutes including, for instance, the Religious Freedom Restoration Act (42 U.S.C. § 2000bb) prohibiting the federal government from substantially burdening a person's exercise of religion. 73 Fed. Reg. 19,078 (April 8, 2008).

Also on April 1, 2008, the Secretary issued a waiver covering a 22 mile stretch in Hidalgo County, Texas. The Hidalgo County waiver is identical in scope to

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[5] This waiver was corrected on April 8, 2008 to include geographical information on the project areas. In addition to the specific laws waived in the Secretary's October 26, 2007 pronouncement, on April 1 the Secretary specifically waived the following laws: the Coastal Zone Management Act (16 U.S.C. § 1451 *et seq.*); the Wilderness Act (16 U.S.C. § 1131 *et seq.*); the National Wildlife Refuge System Administration Act (16 U.S.C. §§ 668dd-668ee); the Fish and Wildlife Act of 1956 (16 U.S.C. § 742a *et seq.*); the Otay Mountain Wilderness Act of 1999 (Pub. L. 106-145); Sections 102(29) and 103 of Title I of the California Desert Protection Act (Pub. L. 103-433); 50 Stat. 1827, the National Park Service Organic Act (16 U.S.C. §§ 1, 2-4); the National Park Service General Authorities Act (16 U.S.C. §§ 1a-1 *et seq.*); Sections 401(7), 403 and 404 of the National Parks and Recreation Act of 1978 (Pub. L. 95-625); Sections 301(a)-(f) of the Arizona Desert Wilderness Act (Pub. L. 101-628); the Rivers and Harbors Act of 1899 (33 U.S.C. § 403); the Eagle Protection Act (16 U.S.C. § 668 *et seq.*); the Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 *et seq.*); the American Indian Religious Freedom Act (42 U.S.C. 1996); the Religious Freedom Restoration Act (42 U.S.C. § 2000bb); the National Forest Management Act of 1976 (16 U.S.C. § 1600 *et seq.*); and the Multiple Use and Sustained Yield Act of 1960 (16 U.S.C. §§ 528-531).

the Secretary's other April 1, 2008 waiver. 73 Fed. Reg. 19,077 (April 8, 2008).[6]

To date, the Secretary has seen fit to waive laws protecting the environment, public health, freedom of religious exercise and historic resources. But with no more than the unsupported assertion of "necessity" that he has invoked to waive those laws, the Secretary also may waive any other law he desires. He is equally free to waive the requirements of the Fair Labor Relations Act to halt a strike, or the provisions of the Occupational Safety and Health Act to force workers to endure unsafe working conditions, or the state speed limits in California, New Mexico, Arizona and Texas to race equipment and materials to construction sites. Section 102(c) gives the Secretary the power to waive treaties with Mexico governing the location of the border, management of the border zone, and movement of water, goods and services across the border so long as he deems it, in his sole and unreviewable discretion, "necessary." Indeed, under Section 102(c) the Secretary could waive the immigration laws and regulations, hire illegal aliens, and pay them less than minimum wage if he deems it necessary to build the fence.

It also bears noting that the Secretary has specifically waived all state and local laws relating to the subjects of the 30 federal laws named in his waivers. This includes all state and local laws dealing with the environment, water and riparian rights, historic preservation, Native American religious freedom and practices, and other topics. The constitutional basis for this sweeping, unlegislated

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[6] This waiver, too, was corrected on April 8 to describe the project area.

preemption of the laws of four states raises an additional set of pressing constitutional questions.

We recite these facts to demonstrate the sweeping scope of the waivers already in place. As individuals who study, teach and publish on constitutional and administrative law, *amici* have differing views of the constitutional jurisprudence establishing the outer limits of permissible delegation of powers and separation of powers. We are, however, unanimous in our view that, whatever those limits may be, the sweeping delegation to the Homeland Security Secretary in Section 102(c) of the IIRIRA, when coupled with the preclusion of judicial review, raises significant questions that this Court should address about whether there has been an unconstitutional delegation of power and, more generally, whether the separation of powers doctrine has been violated.

## II. A WRIT OF CERTIORARI SHOULD ISSUE TO CONSIDER WHETHER EXCEPTIONALLY BROAD DELEGATIONS TO UNELECTED MEMBERS OF THE EXECUTIVE BRANCH REQUIRE THE AVAILABILITY OF JUDICIAL REVIEW

Section 102(c) of the IIRIRA forbids judicial challenges to Secretary Chertoff's waiver determinations. After vesting exclusive jurisdiction in the district courts, section 102(c)(2)(A) of the statute sharply limits that jurisdiction:

> A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

The Court has consistently highlighted the availability of judicial review of administrative action as an essential predicate to upholding broad delegations of congressional power under the "intelligible principle" requirement. *See, e.g., Touby v. United States*, 500 U.S. 160, 168-69 (1991); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 216 (1989); *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Yakus v. United States*, 321 U.S. 414, 436 (1944). The IIRIRA's prohibition of judicial review presents a critical question warranting a grant of certiorari.

It is a longstanding principle of this Court that Congress can delegate powers to the executive branch "so long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed.'" *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 216 (1989) (*quoting Yakus v. United States*, 321 U.S. 414, 426 (1944)); *see also Mistretta v. United States*, 488 U.S. 361, 379 (1989) (same). The availability of judicial review ensures executive compliance with congressional will, and thereby ensures that the executive branch is limited to enforcing the law, rather than making it. *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). For instance, the broad rulemaking delegation approved of by this Court in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), was subject to judicial review under the APA. 531 U.S. at 475-76. "Judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." *Touby v. United States*, 500 U.S. 160, 170 (1991) (Marshall, J., concurring) (*citing Skinner*, 490 U.S. at 218-219).

In the modern era of broad delegations to administrative agencies, judicial review assures the continuing validity of Chief Justice Marshall's observation:

> It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to [the claimant] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.

*United States v. Nourse*, 9 Pet. 8, 28-29, 9 L. Ed. 31 (1835). Therefore, our "constitutional structure contemplates judicial review as a check on administrative action that is in disregard of legislative mandates. . . ." *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 44 (1999) (Thomas, J., dissenting). This insight underlies the well-established presumption of the reviewability of agency action. *Abbott Laboratories*, 387 U.S. 136, 140 (1967). "Concepts of control and accountability define the constitutional requirement." *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (three judge panel) (Leventhal, J.).[7]

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[7] When Congress intends to preclude judicial review, the Court has required Congress to do so with "specific language or specific legislative history that is a reliable indicator of congressional intent." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 673 (1986) (citing *Black v. Community*

Broad congressional delegations of power to the executive likewise pass constitutional scrutiny in significant part because they provide for judicial review of their implementation.[8] In *Chadha* the Court, distinguishing lawmaking (which requires adherence to bicameralism and presentment) from administrative action (which does not), relied on the limitations constraining administrative action, limitations that assumed the existence of judicial review:

> The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that

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*Nutrition Institute*, 467 U.S. 340, 349, 351 (1984)), *superseded by statute*, Omnibus Budget Reconciliation Act of 1986, 42 U.S.C. § 1395ff (1992). "Clear and convincing evidence" is required to overcome the "strong presumption that Congress did not mean to prohibit all judicial review of executive action." *Bowen*, 476 U.S. at 671-72 (citing and quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) and *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)).

[8] One scholar has connected judicial review of agency action and non-delegation as follows: "Framed as a sort of presumption, the notion was that [judicial] review was necessary to assuage concerns over the constitutionality of the New Deal regulatory statutes. Review was part of a constitutional quid pro quo: courts would decline to employ the nondelegation doctrine to overturn statutes and, in return, courts would preserve the power to review agency decisions." Daniel D. Rodriquez, *The Presumption of Reviewability: A Study In Canonical Construction and Its Consequences*, 45 Vand. L. Rev. 743, 755 (1992). Of course this statement does not contemplate the situation present in this case, where a constitutionally troubling delegation comes unaccompanied by judicial review. *Cf. Touby v. United States*, 500 U.S. 160 (1991) (rejecting an argument that a statute constituted an unconstitutional delegation due to its lack of judicial review, not by concluding that judicial review was unnecessary, but rather by finding an adequate provision of judicial review).

> created it—a statute duly enacted pursuant to Art. I [§§] 1, 7. The constitutionality of the Attorney General's execution of the authority delegated to him by [the Immigration and Nationality Act] involves only a question of delegation doctrine. The courts, when a case or controversy arises, can always "ascertain whether the will of Congress has been obeyed," *Yakus v. United States*, 321 U.S. 414, 425, 64 S.Ct. 660, 668, 88 L.Ed. 834 (1944), and can enforce adherence to statutory standards. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 72 S.Ct. 863, 865-866, 96 L.Ed. 1153 (1952); *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (CADC) (en banc) (separate statement of Leventhal, J.), *cert. denied*, 426 U.S. 941, 96 S.Ct. 2662, 49 L.Ed.2d 394 (1976); L. Jaffe, Judicial Control of Administrative Action 320 (1965). *It is clear, therefore, that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act.*

*Chadha*, 462 U.S 919, 953 n.16 (1983) (emphasis added). "Congress has been willing to delegate its legislative powers broadly—and the courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits." *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 68 (D.C. Cir. 1976) (*en banc*) (Leventhal, J., concurring) (footnote omitted), *cert. denied*, 426 U.S. 941 (1976). An excessively broad waiver provision that does not require the Secretary to provide reasons, and whose invocation is not subject to judicial review, obfuscates any assessment of what the congressional will is, or whether it is being followed. Indeed, selective

waiver actions by the Secretary may allow the agency to make law in a way that bypasses Article I procedures.

Beyond ensuring basic fidelity to statutory commands that have complied with Article I, judicial review of agency action also helps guard against arbitrary use of discretion in implementing statutes. *See Clinton v. City of New York*, 524 U.S. 417, 489 (1998), (Breyer, J., dissenting). When Congress gives a broad grant of authority that could support a range of different agency decisions, and such legislative directive thus necessarily cannot provide fully sufficient guidelines, judicial review protects "the coherence and integrity of the legislative process." Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 656 (1985). Indeed, even the mere availability of judicial review plays this salutary role, as "the prospect of review increases the likelihood of fidelity to substantive and procedural norms." *Id.* Judicial review of discretionary agency action is especially important given agencies' lack of direct electoral accountability. *Cf. Clinton*, 524 U.S. at 490 (Breyer, J., dissenting) (distinguishing on this basis between the importance of judicial review of presidential discretion and review of agency discretion).

By contrast, the absence of judicial review has been a significant consideration on the occasions when this Court has found that statutes constitute unconstitutional delegations. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 533 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432 (1935). Indeed, delegations without judicial review have only been upheld when they have not raised serious separation of powers issues. *See, e.g., Heckler v.*

*Chaney*, 470 U.S. 821 (1985) (authority to the Food and Drug Administration to bring enforcement actions under the Food, Drug and Cosmetic Act); *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309 (1958) (authority to Panama Canal Company to set Panama Canal tolls at a rate that covers costs of operating the canal). In cases raising non-delegation concerns the Court has taken pains to note both the existence of judicial review and, indeed, the adequacy of the particular judicial review provisions. *See, e.g.*, *Touby*, 500 U.S. at 168-169.

The petition for certiorari raises important questions, so far unanswered by the Court, about the necessity of judicial review to the constitutionality of exceptionally broad delegations of congressional power. Certainly, as described above, prior authority from this Court suggests the importance of judicial review as a predicate to the resolution of non-delegation claims. *See, e.g., Touby*, 500 U.S. at 168-79 & 170 (Marshall, J., concurring); *Skinner*, 490 U.S. at 218-19; *Chadha*, 462 U.S. at 953 n. 16; *Youngstown Sheet & Tube*, 343 U.S. at 585; *Yakus*, 321 U.S. at 425. In *Department of Interior v. South Dakota*, 519 U.S. 919 (1996), this Court vacated and remanded without need for argument a judgment of the Eighth Circuit, after the Solicitor General had effectively conceded that the agency's action was judicially reviewable. However, the dissenting opinion appears to raise doubts about the necessity of judicial review to a valid delegation of legislative power. 519 U.S. at 921-22 (Scalia, J., dissenting). The uncertainty on this fundamental issue has been noted by the lower courts. *See, e.g., United States v. Hammoud*, 381 F.3d 316, 331 (4th Cir. 2004) (en banc) ("it is not clear whether the nondelegation doctrine requires any form of judicial review"),

*vacated on other grounds*, 543 U.S. 1097 (2005). This uncertainty also has led to inconsistent results. *See, e.g.*, *United States v. Bozarov*, 974 F.2d 1037, 1041-45 (9th Cir. 1992) (reversing district court's decision that that the Export Administration Act violated the non-delegation doctrine because of the lack of a provision for judicial review), *cert. denied*, 507 U.S. 917 (1993).

This case presents the question in the starkest possible way. Section 102(c) of the IIRIRA presents the Court with a nearly unprecedented delegation of authority to waive any "legal requirement[]" in the nation. That authority is unchecked by any judicial review of whether the administrative agency is making those waivers in compliance with congressional will and in a reasoned fashion. The Secretary has employed this discretion aggressively and without real explanation. The characteristics of the challenged statute and its implementation make it an ideal vehicle to resolve the question of whether the grant of such broad waiver power to an unelected official, without judicial review of his use of that power, is constitutional.

## III. SECTION 102(c) RAISES PROFOUND QUESTIONS CONCERNING THE POWER OF CONGRESS TO DELEGATE ITS POWER TO NULLIFY A LAW

In addition to the unprecedented breadth of the power granted to the Homeland Security Secretary, Section 102(c) endows him with a core Article I power. U.S. Const. art. I, § 1. The waiver or limitation of a statute is a quintessentially legislative function. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 437-441 (1992). The challenged legislative action in *Seattle Audubon Society*, "deeming" certain

statutory provisions to be satisfied if federal agencies took certain specified actions in connection with active litigation, partially suspended provisions of five statutes on which lawsuits had been brought. 503 U.S. at 434-36. The Court viewed the temporary modification of these environmental laws as legislative action within Congress's power. *Id.* at 437-41. The Court rejected contentions that the statute's unusual nature and, indeed, omnibus character (determining compliance with a number of statutes) meant that Congress had encroached on the powers of the judiciary. *Id.* Instead the Court looked beyond the unusual form of the law and the references to judicial action to the core reality that Congress was only modifying or temporarily superseding its own enactments. *Id.* ("We conclude that Subsection (b)(6)(A) compelled changes in law, not findings or results under old law").

Like the statute in *Seattle Audubon Society*, Section 102(c) authorizes the supersession, perhaps temporary, of statutes in a part of a country. "Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary . . . ." IIRIRA § 102(c)(1). Unlike the statute in *Seattle Audubon Society*, however, Section 102(c)'s power to temporarily nullify is to be exercised not by Congress, but by an unelected executive branch official. And unlike the statute in *Seattle Audubon Society*, this delegation of a uniquely Congressional power is made without limits as what statutes may be nullified, or even for how long.

On prior occasions Congress has granted authority to an agency to waive a legal provision upon the

happening of specified events, or upon the making of specified determinations. Section 102(c), however, is unprecedented in the breadth of its waiver. As the Congressional Research Service noted, Section 102(c) is not analogous to statutes that impose a rule of conduct but then authorize the agency to waive that rule under certain circumstances. Instead, Section 102(c)'s waiver authority is freewheeling, extending to any "legal requirement" in force. The breadth of Section 102(c)'s authority has already been remarked upon. But additionally troubling is that the Homeland Security Secretary's waiver authority is not linked to the original grant of power—*i.e.*, the original rules of conduct his agency is empowered to implement.

This decoupling raises the question of whether Section 102(c) is functionally indistinguishable from the omnibus nullifying authority that the Court struck down in *Clinton v. City of New York*, 524 U.S. 417 (1998). The *Clinton* Court was rightly concerned that what emerged from the President's exercise of his powers under the Line Item Veto Act—"truncated versions of two bills that passed both Houses of Congress"—were "not the product of the 'finely wrought' procedures that the Framers designed." 524 U.S. at 440. So too the waivers resulting from the Secretary's exercise of his Section 102(c) powers permit the executive to modify statutes in disregard of the "single, finely wrought and exhaustively considered, procedure" set forth in the Constitution to enact or modify statutes. *Chadha*, 462 U.S. at 951. That single constitutional procedure does not contemplate an unelected official in the executive branch performing the functional equivalent of partially repealing statutes. The repeal, even partial, of a legislative enactment is itself a uniquely legislative

act. *Chadha*, 462 U.S. at 954 (repeal of statutes, no less than enactment, must conform with Art. I).

It is, of course, no answer to contend that the Secretary's repeal power is only partial. For the geographic areas, the circumstances and the time frames decided upon by the Secretary, the target laws are a nullity. Just as it constituted a legislative act for Congress in *Seattle Audubon Society* to have deemed a variety of laws, as they applied to the Pacific Northwest forests, satisfied by the performance of certain specified actions, so too is it a legislative act to deem environmental, historical preservation, religious freedom and procedural laws without force in the "vicinity" of areas where border fences might be constructed.

At a minimum, Section 102(c) raises the question of whether the legislative perquisite of repealing and modifying statutory law can be delegated to an unelected executive branch official. The Secretary's actions to date pursuant to Section 102(c) directly frame this question for the Court. This case presents the Court with the opportunity to delineate whether such a delegation can ever be Constitutional and, if so, to demarcate the outer bounds of any such delegation.

* * *

"[L]iberty demands limits on the ability of any one branch to influence basic political decisions." *Clinton v. City of New York*, 524 U.S. 417, 450-51 (1998) (Kennedy, J., concurring). Quoting Montesquieu, the Federalist made the point as follows:

> "When the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest *the same* monarch or senate

> should *enact* tyrannical laws to *execute* them in a tyrannical manner.' Again: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.'"

524 U.S. at 451 (quoting *The Federalist No. 47*, at 303 (James Madison) (Clinton Rossiter ed., 1961)) (emphasis in original).

A writ of certiorari should issue to determine whether Congress's standardless grant to the Homeland Security Secretary to make sweeping and unreviewable waivers of federal, state and local laws so raises the specter of arbitrary control and power that it violates the principles of separation of powers by unconstitutionally delegating legislative power to the Secretary of Homeland Security.

## CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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# APPENDIX

# APPENDIX A

## LIST OF AMICI

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## APPENDIX B

[LOGO]

Congressional Research Service

***Memorandum*** February 9, 2005

SUBJECT: **Sec. 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders**

FROM: Stephen R. Viña and Todd B. Tatelman
Legislative Attorneys
American Law Division

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Section 102 of H.R. 418, the REAL ID Act, captioned "Waiver of Laws Necessary for Improvement of Barriers at Borders," provides the Secretary of Homeland Security with authority to waive all laws he deems necessary for the expeditious construction of the barriers authorized to be constructed by § 102 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) (P.L. 104-208, Div. C, codified at 8 U.S.C. § 1103 note) and bars judicial review of such waiver decisions. This memorandum discusses the waiver provision in general; the extent to which Congress has passed laws that provide waivers comparable to §102 of H.R. 418; and the judicial review provisions. For background information on the border fence and § 102 of IIRIRA please refer to CRS Report RS 22026, *Border Security: Fences Along the U.S. International Border*.

**H.R. 418, §102**

Section 102 of H.R. 418 would amend § 102(c) of IIRIRA to read as follows:

> (c) Waiver—
>
> (1) IN GENERAL—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive, and shall waive, all laws such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section.
>
> (2) NO JUDICIAL REVIEW—Notwithstanding any other provision of law (statutory or non-statutory), no court shall have jurisdiction—
>
> (A) to hear any cause or claim arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1); or
>
> (B) to order compensatory, declaratory, injunctive, equitable, or any other relief for damage alleged to arise from any such action or decision.

**Waiver Provisions**

If enacted, the new § 102 would provide the Secretary of Homeland Security with not only the authority to waive *all* laws he determines necessary to ensure the expeditious construction of the barriers and roads under § 102 of IIRIRA, but the *requirement* that the Secretary do so. This provision could provide the Secretary with broader waiver authority than what is currently in § 102(c) of IIRIRA. This authority would apparently include laws other than the

Endangered Species Act and the National Environmental Policy Act, but may not include a waiver of protections established in the Constitution.[1] All laws waived, however, must be determined by the Secretary to be necessary to ensure expeditious construction of the barriers and roads. The waiver authority provided by this amendment would also seem to apply to all the barriers that may be constructed under the authority of § 102 of IIRIRA—i.e., both to barriers constructed *in the vicinity of the border to deter illegal crossing in areas of high illegal entry*[2] and to the barrier that is to be constructed near the San Diego area.

Congress commonly waives preexisting laws, though the process necessary to complete the waiver and the number of laws waived vary considerably from provision to provision. Even more common is the use of the phrase, "notwithstanding any other provision of law." While the use of a broad "notwithstanding any

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[1] See discussion *infra*. During debate of a similar exemption provision for the border fence in the 108th Congress, supporters argued that labor and other non-environmental laws would not be considered as included in the phrase "any other laws." 151 Cong. Rec. H8899-H8901 (debate of amendment to H.R. 10). It is also not clear if state laws would be included in this waiver provision.

[2] There does not appear to be any statutory or regulatory definition for "high illegal entry." Note however, that over the last seven years 97% of all illegal alien apprehensions were made along the Southwest border. *See* CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*. Such a high percentage could be noted by those who might contend that the authority in § 102(a) of IIRIRA is more applicable, at least for now, to our Southwest borders; ultimately, however, it is the Secretary of DHS who determines places of "high illegal entry" under the section.

other provision of law" rarely settles the interpretive question, such directives seem facially preclusive, and some courts have determined that "notwithstanding" language may serve to explicitly preempt the application of other laws.[3] Other courts, however, have held that such provisions are generally not dispositive in determining the preemptive effect of a statute.[4]

After a review of federal law, primarily through electronic database searches and consultations with various CRS experts, we were unable to locate a waiver provision identical to that of §102 of H.R. 418—i.e., a provision that contains "notwithstanding language," provides a secretary of an executive agency the authority to waive all laws such secretary determines necessary, and directs the secretary to waive such laws.[5] Much more common, it appears, are waiver provisions that (1) exempt an action from other requirements contained in the Act that authorizes the action, (2) specifically delineate the laws to be waived, or (3) waive a grouping of similar

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[3] *See e.g., Puerto Rico v. M/V Emily S.*, 132 F.3d 818 (1st Cir. 1997). In instances where "notwithstanding" language has been deemed controlling, courts sometimes buttress such decisions with an analysis of the underlying directives or legislative history of a statute. *See e.g., Illinois Nat'l Guard v. Federal Labor Relations Authority*, 854 F.2d 1396, 1402 (D.C. Cir. 1998).

[4] *See e.g., E.P. Paup v. Director, OWCP*, 999 F.2d 1341, 1348 (9th Cir. 1993); *Oregon Natural Resources Council v. Thomas*, 92 F.3d 792, 796 (9th Cir. 1996).

[5] Our search did not include a review of annual appropriations language, which may include similar waiver provisions. It should be noted however, that as a general proposition, appropriations language is limited to the year of the appropriation, which may limit the application of any waiver.

laws. The most analogous provisions that we located appear to be, at least on their face, the following:[6]

- 43 U.S.C. § 1652(c): Allows the Secretary of the Interior and other Federal officers and agencies the authority to waive any procedural requirements of law or regulation which they deem desirable for authorizations that are necessary for or related to the construction, operation, and maintenance of the Trans-Alaska oil pipeline system (e.g., rights-of-way, permits, and leases).[7]
- 25 U.S.C. §3406: Allows the Secretaries of the Interior, Labor, Health and Human Services, and Education, notwithstanding any other law, to waive any statutory requirement, regulation, policy, or procedure promulgated by their agency that is identified by a tribal government as necessary to implement a submitted tribal plan under the Indian Employment, Training and Related Services Demonstration Act of 1992, as amended.
- 20 U.S.C. §7426: Provides almost identical waiver language to that of 25 U.S.C. §3406, but for plans submitted by tribal governments

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[6] Similarly, we found some provisions that exempt certain transactions or entities from all laws. *See e.g.,* 49 U.S.C. §11321 ("A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.").

[7] It is unclear how broadly a procedural requirement of law has been or could be interpreted.

for the integration of education and related services provided to Indian students.

There are also many other provisions that arguably grant broad waiver authority similar to that of § 102, but contain qualifications or reporting requirements that seem to limit their breadth.[8] Some of these waiver provisions grant the President or the head of an Executive agency the authority to waive a law[s] if deemed necessary in the *national interest* or in the interest of *national defense*. We cite here, some examples of this type of waiver authority:[9]

- 43 U.S.C. §2008: Allows the President to waive provisions of federal law he deems necessary in the national interest to facilitate the construction or operation of crude oil transportation systems or the Long Beach-Midland project. The President must submit his waiver to Congress, and Congress must pass a joint resolution before the President can take such actions under the waivers.
- 15 U.S.C. 2621: Allows the Administrator of the EPA to waive compliance with the Toxic Substances Control Act upon a request and determination by the President that the requested waiver is necessary in the interest of national defense.

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[8] Examples of waiver authority with a congressional notification element include: 15 U.S.C. §719f; 22 U.S.C. §2378; 22 U.S.C. §2371; and 41 U.S.C. §413. Other examples of broad yet somewhat more limited waiver authority include: 10 U.S.C. §433; 22 U.S.C. §3861; 25 U.S.C. §1680h; 48 U.S.C. §1469d; and 50 U.S.C. §198.

[9] Other waiver authority in the national interest include: 10 U.S.C. § 1107(a); 22 U.S.C. §2375(d); 29 U.S.C. §793; 42 U.S.C. §6212(b); 42 U.S.C. §6393(a)(2); 50 U.S.C. §2426(e).

- 10 U.S.C. §433: Allows the Secretary of Defense, in connection with a "commercial activity," to waive federal laws pertaining to the "management and administration of Federal agencies," if compliance would create an unacceptable risk to an authorized intelligence activity. This provision further requires that the waiver be in writing and specifically describes the types of activities that pertain to the "management and administration of federal agencies," though it does not specify the actual laws.

As mentioned above and as the examples we have set forth arguably demonstrate, the breadth of waiver authority granted by § 102 of H.R. 418 does not appear to be common in the federal law searched.

**Judicial Review Provisions**

By including the language "no court," §102(c)(2) of H.R. 418 appears to preclude judicial review of a Secretary's decision to waive provisions of law by both federal and *state* courts. It is generally accepted that Article III of the United States Constitution grants Congress the authority to regulate the jurisdiction, procedures, and remedies available in federal courts.[10] However, what remains uncertain is whether Congress's authority, pursuant to Article III, extends to the jurisdiction, procedures, and remedies of state courts. In addition, it remains uncertain to what extent Congress has Article III authority to prevent courts, state or federal, from addressing and

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[10] Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. Article III.

remedying issues arising under the United States Constitution.

With respect to Congress's ability to control the jurisdiction of state courts, the Supreme Court has ruled that subject to a congressional provision to the contrary, state courts have concurrent jurisdiction over all the classes of cases and controversies enumerated in Article III, except for suits between States, suits in which either the United States or a foreign state is a party, and those considered within the traditional jurisdiction of admiralty law.[11] Thus, it appears possible to argue that Congress has a plenary power to allocate jurisdiction between the state and federal courts. In other words, if, for example, Congress can make jurisdiction over an area of law exclusively federal,[12] thereby depriving state courts of any ability to hear the claim, it appears that Congress may also be able to remove a cause of action

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[11] *See* 28 U.S.C. §§ 1251, 1331 *et seq.* (2004). In fact, the presumption is that state courts enjoy concurrent jurisdiction, and Congress must explicitly or implicitly confine jurisdiction to the federal courts to oust the state courts. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-84 (1981); *see also Tafflin v. Levitt*, 493 U.S. 455 (1990); *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990). For example, Justice Scalia has argued that, insomuch as state courts have jurisdiction generally because federal law *is* law for them, Congress can provide exclusive federal jurisdiction only by explicit and affirmative statement in the text of the statute, but as can be seen that is not now the rule. *See Tafflin v. Levitt*, 493 U.S. 455, 469 (1990).

[12] Perhaps the best example of an area of law that Congress has made exclusively federal is immigration. Federal Courts, however, also appear to have exclusive jurisdiction over the federal antitrust laws, despite the fact that Congress has never spoken either expressly or implicitly. *See General Investment Co. v. Lake Shore & Michigan Southern R.R. Co.*, 260 U.S. 261, 287 (1922).

from state courts without concurrently granting jurisdiction to the federal courts.

State courts, however, are often considered to be independent and autonomous from the federal court system. This independent status has led some scholars to argue that because the Constitution appears to reserve to the states the authority to control the jurisdiction of their own courts, Congress's "only means of allocating jurisdiction is through control of the federal court's jurisdiction."[13] The argument that state courts are autonomous can be derived, in part, from the Supreme Court's doctrine with respect to its ability to review decisions from state courts. While the Court has the authority to review a decision of a state's highest court, it has repeatedly held that it will not do so if the decision rests upon adequate and independent state grounds.[14] This rule is arguably designed to protect a state's interest in developing and applying its own laws. Thus, it would appear that an argument can be made that Congress does not possess the authority to regulate the jurisdiction of state courts directly. It may be the case, however, that Congress's ability to control the jurisdiction of the federal courts indirectly affects and alters the

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[13] Joan Steinman, *Reverse Removal*, 78 IOWA L. REV. 1029, 1080 (1992) (*citing Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990); *Gulf Oil Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981); Henry M. Hart Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)).

[14] *See Colman v. Thompson*, 501 U.S. 722, 729 (1991) (stating that the Court will not review a state court decision "if the decision of the court rests on a state law ground that is independent of the federal question and adequate to support judgment").

jurisdiction of the state courts, which would appear to preserve their autonomous status.[15]

Turning to Congress's ability to remove jurisdiction with respect to claims arising under the Constitution, it appears that Supreme Court precedent requires that at least some forum be provided for the redress of constitutional rights.[16] While it appears that the Supreme Court has not directly addressed whether there needs to be a judicial forum to vindicate all constitutional rights, it appears that the Court has taken to noting constitutional reservations about legislative denials of jurisdiction for judicial review of constitutional issues, as well as construction of statutes that purport to limit the Court's jurisdiction.[17] At least one justice, however, has indicated that there have been particular cases, such as political question cases, where all constitutional review is in effect precluded.[18]

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[15] It should be noted, however, that a court may interpret this provision to be preclusive, which would appear to avoid any constitutional issues.

[16] *See Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). For a much more complete discussion of this issue, *see* CRS Report RL31271, *Limiting Court Jurisdiction Over Federal Constitutional Issues: "Court-Stripping,"* by Kenneth R. Thomas, Jan. 24, 2005.

[17] *See Johnson v. Robinson*, 415 U.S. 361, 366-67 (1974); *see also Weniberger v. Salfi*, 422 U.S. 749, 762 (1975); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 664, 681 n. 12 (1988); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 498 (1991); *Felker v Turpin*, 518 U.S. 651, 660-61 (1996); *INS v. St. Cyr*, 533 U.S. 289, 298, 314 (2001).

[18] *See Webster v. Doe*, 486 U.S. 592, 612-13 (1988) (Scalia, J., dissenting) ("Even apart from the strict text of the Constitution, we have found some constitutional claims to be beyond judicial

Nevertheless, the Court has generally found a requirement that effective judicial remedies be present. For example, in cases involving particular rights, such as the availability of effective remedies for Fifth Amendment takings, the Court has held that "the compensation remedy is required by the Constitution."[19] In addition, lower federal courts appear to have held that, in most cases, some forum must be provided for the vindication of constitutional rights.[20] Cases such as these would seem to provide a basis for the Court to find that parties seeking to vindicate other particular rights must have a judicial forum for such challenges; therefore, the Court may construe the provisions of H.R. 418 in a manner that preserves this right.

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review because they involve "political questions." . . . In sum, it is simply untenable that there must be a judicial remedy for every constitutional violation. Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are.").

[19] *See First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 316 (1987) (*citing Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984); *United States v. Causby*, 328 U.S. 256, 267 (1946); *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304-306 (1923); *Monongahela Navigation v. United States*, 148 U.S. 312, 327 (1893)).

[20] *See Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d. Cir. 1948) (stating that "while Congress has the undoubted power to give, withhold, or restrict the jurisdiction of courts other than the Supreme Court, it must not exercise that power as to deprive any person of life, liberty, or property without due process or just compensation . . . ."). In addition, other judicial decisions point to the doctrine of sovereign immunity and the ability of the government to limit the remedies available to plaintiffs. *See Bartlett v. Bowen*, 816 F.2d 695, 719-720 (1987) (Bork, J., dissenting).